Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CASE NO. 79-80

STEVEN LEW QUATTRY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM DISTRICT COURT OF APPEAL
OF FLORIDA - FOURTH DISTRICT

MOTION TO DISMISS OR AFFIRM

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STEVEN LEW QUATTRY,
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STATE OF FLORIDA,
Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, the State of Florida, by and through undersigned counsel, hereby moves this Court to dismiss and/or affirm the above-styled cause because it does not raise a substantial federal question; the federal question was not timely and properly raised, and the judgment rests on an adequate non-federal ground.

INTRODUCTORY STATEMENT

Appellee does not agree with Appellant's Introductory Statement found on page 1 of his Jurisdictional Statement. The Fourth District Court of Appeal affirmed the ruling of the lower court without opinion. Contrary to Appellant's assertion, there is nothing in the opinion which would support Appellant's claim regarding the Fourth District's specific holding. Appellee submits that the most that can be said of the Fourth District's decision is that the appellate court found the instant facts complied with §934.07 Fla. Stat.

JURISDICTION

Appellant has claimed that the "Fourth District Court of Appeal upheld the validity of Fla. Stat. §934.07 (1977) against the challenge of its being repugnant to 18 U.S.C.A. §2516(2)." It is Appellee's position that there was no challenge and this Court is therefore without jurisdiction.

Appellee points out that this Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented. Dept. of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965). The burden is on the party seeking review to show that this Court has jurisdiction of the case. Id. To vindicate jurisdiction, the inquiry is whether the question was presented in such a manner that it was necessarily decided

by the appeals court when it affirmed the conviction. If the question was not so presented, then this Court has no power to consider it. Street v. New York, 394 U.S. 576 (1969). When the Appellant fails to show any timely insistence was made in the State courts that a state statute as applied is repugnant to the federal Constitution; treaties or laws, the appeal must be dismissed. Slagle v. Ohio, 366 U.S. 259 (1961).

In the instant case, it is quite apparent that Appellant never raised the federal question in the State Court. From an examination of his own excerpts in the State Court proceedings (at p.6-7 of Appellant's Jurisdictional Statement), the only clear claim that Appellant presented was that the situation in the instant case did not comply with the applicable Florida Statute. He analogizes to

the federal statute but never makes the argument that the facts applied to the state statute would be in contravention of the federal statute. Without such a claim plainly presented, the above-cited cases require this Court to refrain from hearing this case.

To buttress this argument further, Appellee cites a portion of Appellant's State Appeal Brief which was partially alluded to by Appellant in his Jurisdictional Statement at page 8. Appellant cited the following to demonstrate he raised a federal question:

> Section 2516(2) of Title III requires that the principal prosecuting attorney is the only party permitted to apply to the judge for an order. Thus, §934.07 must comply accordingly. If it permits less, then the statute must be invalid. [Id. at 40].

However, he failed to include the next two sentences which followed the above

quote:

> But without having to reach this question, since §934.07 contains no language contrary to §2516(2), then the provisions of this latter enactment must be said to be contained in the former. This is entirely consistent with the general discussion in United States v. Lanza, supra, 341 F. Supp. at 410-411, which recognized that §934.07, in fact, enacted more stringent rules than §2516, and affords more protection.

At best, Appellant merely mentioned the possible invalidity of the state statute in passing. That would not be sufficient for purposes of jurisdiction. See De Backer v. Brainard, 396 U.S. 28 (1969). Furthermore, Appellant informed the State Appeal Court in his brief that the question did not have to be reached. (Appellant's Brief, supra.) Obviously, he has failed to timely and properly present the federal question.

Even assuming that Appellant properly raised the question, this Court is

still without jurisdiction since the state court opinion could rest on an adequate non-federal ground. When the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Durley v. Mayo, 351 U.S. 277 (1955); Stembridge v. Georgia, 343 U.S. 541 (1951). This Court is without jurisdiction when the question of the existence of an adequate state ground is debatable. Id. It is presumed that the state statute will be construed in such a way as to avoid the constitutional question presented. Poulos v. New Hampshire, 345 U.S. 395 (1953); Fox v. Washington, 236 U.S. 273 (1915). Here, where Appellant acknowledged to the State Court that the validity question need not be reached, it is

apparent that he admitted that the decision could rest on an adequate state ground.

As a final note, Appellee submits that Appellant's federal question is insubstantial, frivolous and lacking sufficient merit for this Court to review it. Appellant's essential contention is that the authorizing officer himself has to make the application to the court. A plain reading of both the federal and state statute demonstrates his contention to be false.

Both 18 USCA §2516 and F S §934.07 are entitled "Authorization for interception of wire or oral communication." Under this heading one finds the necessary requirements for Authorization. Both federal and state statute allude to a later section, the federal specifically, the state generally. Those

sections 18 US §2518 and F S §934.09 are entitled "Procedure for interception of wire or oral communications." Under this heading one finds the necessary procedure involved in obtaining a lawful wiretap.

Each application shall include the following information:

> (a) The identity of the investigative or law enforcement officer making the application and the officer authorizing the application 18 USCA §2518 (1) (a), F S §934.09 (1) (a)

The above procedure is referring to two distinct people who have to be identified: the person making the application who is a law enforcement officer, and the officer who is authorizing the application, in this case, the State Attorney. Clearly the statutory procedures do not require the State Attorney to fill both roles. This is common sense. Surely,

the authorizing officer is not the primary source of knowledge in this area. Whatever enlightenment he could give the court would be second-hand. United States v. Turner, 538 F. 2d 143 (9th Cir. 1975).

The intent of Congress in passing this statute was to centralize in a publicly responsible official subject to the political process the formation of law enforcement policy on the use of electronic surveillance techniques and to insure that should abuses occur, the lines of responsibility will lead to an identifiable person. United States v. Giordano, 416 U.S. 505 (1974). This intent is clearly not circumvented by a law enforcement officer making application to the court after a proper authorization by the State Attorney.

CONCLUSION

Because Appellant has failed to timely and properly raise the issue in the State Court, the State Court opinion rests on an adequate non-federal ground, and the question presented is not substantial, Appellee respectfully requests this Court to dismiss and/or affirm the instant appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss or Affirm has been furnished, by mail, to Larry M. Roth, Esquire, Law Offices of Rutberg and Roth, 385 S. Highway 17-92, P.O. Box 977, Casselberry, Florida 32707, this _____ day of _____, 1979.

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JOHN D. CECILIAN
Of Counsel

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ROBERT L. BOGEN
Of Counsel